United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-2018

To be argued by:
DAVID L. BIRCH

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA ex rel.
DONALD WILLIAMS,

Petitioner-Appellant,

-against-

JEROME PATTERSON, Superintendent, Eastern Correctional Facility, Napanoch, New York,

Respondent-Appellee.

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BRIEF FOR RESPONDENT-APPELLEE

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TABLE OF CASES

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UNITED STATES OF AMERICA ex rel. DONALD WILLIAMS,

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Docket No. 75-2018

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BRIEF FOR RESPONDENT-APPELLEE

Questions Presented

Did the District Court properly deny an evidentiary hearing?

Does the record demonstrate that the appellant waived his right to be represented by counsel?

Statement

Petitioner-Appellant appeals from a decision of the United States District Court for the Southern District of New York (Tenney, J.) denying without a hearing petitioner-appellant's application for a writ of habeas corpus. On January 17, 1975, this Court granted petitioner-appellant a certificate of probable cause.

Statement of Facts

Appellant, Donald Williams, is presently confined in the Green Haven Correctional Facility, Stormville, New York, pursuant to two judgments of conviction. The first, which is the subject of the instant petition, was rendered by the Supreme Court, New York County (Martinis, J.) on April 6, 1972, after a trial by jury, convicting him of burglary in the third degree. The Court sentenced Williams on May 12, 1972 to a term of from two years and four months to seven years. The conviction was affirmed, 41 A D 2d 1029 (1st Dept., 1973). Leave to appeal to the Court of Appeals was denied.

While on parole from this conviction, Williams was convicted by the Supreme Court, New York County (Fitzer, J.) after a plea of guilty, of criminal possession of a dangerous weapon, on July 30, 1974, and sentenced to a term of from two and one-half years to five years, to be served concurrently with parole time owed on the prior conviction.

The Crime

On September 26, 1971 at approximately 7:15 a.m. a security guard, responding to an alarm at headquarters, went to a clothing store on Seventh Avenue between 132nd and 133rd Streets. After opening the front door with a key he entered and found Williams lying or crouching behind a counter looking

up at him. A rear window was broken. The security guard then called the police who came and took Williams to the police station. Williams was later indicted for burglary in the third degree, petit larceny and possession of burglar's tools.

Pre-trial Proceedings

Williams was represented at the preliminary hearing and at the arraignment by an attorney from the Legal Aid Society (T. 3).* On Williams' request, that attorney was relieved and the Court appointed Alan Stim (T. 3-4).

A Huntley Hearing was held during the period from January 20 to January 26, 1972. The record** demonstrates that Mr. Stim ably represented Williams during the Hearing and that Williams made no complaint about Mr. Stim.

* Page references preceded by T. refer to the trial transcript, part of Appellant's appendix.

** The Huntley Hearing minutes are also part of appellant's appendix. References to it are preceded by HM.

The Huntley hearing was held to determine the voluntariness of any statements that Williams made to the arresting officer or the security guard, even though the district attorney stated at the hearing that the people did not plan to offer any statements made by Williams (HM 58). No statements made by Williams to the police officer or the security guard were introduced at the trial.

At the end of the Huntley hearing, the District Attorney requested that the case be set down for trial on the following Wednesday. The Court set February 2 (7 days from the close of the Huntley hearing). Two of the people's four witnesses at trial had testified at the Huntley hearing.

The Trial

At some time between the close of the Huntley hearing on January 26 and the beginning of trial on April 3, 1972, Williams decided that he wanted a third lawyer. At the beginning of the trial, Mr. Stim stated that "the last judge told me that -- just to sit in court and give the defendant legal advise [sic] if he requires any during the course of the trial." (T. 2)

Williams stated to the Court that he did not want to represent himself (T. 2) but that he did not trust Mr. Stim and had no confidence in him. (T. 3)

The Court responded in part:

"Now Mr. Stim is an able lawyer. He's an experienced lawyer. He's tried many cases in these courts and he's a competent lawyer. I don't know of any friction that exists between you.

"The record in the case appears that you were formerly represented by Legal Aid, and then you asked for an Appellate Division assignment for some reason or other, and the Appellate Division assigned Mr. Stim and relieved the Legal Aid.

"Does the record show that:

THE CLERK: "That's right, your honor.

THE COURT: "Now you just can't go on jumping -- picking lawyers every day from one to the other. Now Mr. Stim is assigned to you. He's going to sit by you.

"You have two choices. You have a choice of having him represent you; otherwise you represent yourself and he'll sit by you throughout the trial for any assistance -- any advice that he may be able ti [sic] give you in the course of the trial that you may want. Now what do you want to do?

THE DEFENDANT: "Your honor, I understand that.

THE COURT: "All right, what do you want to do?

THE DEFENDANT: "What I want to do is have Mr. Stim relieved from my case because if I'm going to be advised I want to be advised by someone who I have not had previously conflict with. I'm not going to ask this man for any advice because I have no confidence in the advice he would give me.

> "I understand about him being a competent lawyer, but as far as him representing me, your Honor, I'm willing to defend myself in this case, under pressure, and I'm being forced to do so because I cannot obtain my own lawyer. I'm not confident. I know little or no law at all. I'm a layman. I'm not familiar with the mechanics of legal procedure so that if I do be forced to represent myself, the trial would be merely a misscarriage [sic] of justice because I'm not familiar with the legal procedures.
>
> THE COURT: "I'll assist you in any way that I possibly can throughout the trial as long as you are going to represent yourself. . . ."

The people's first witness was Patrolman Rodney Addison, who testified that when he went to the store he found Williams lying on the floor with two Holmes guards over him (T. 42-43). Addison testified that the place of entry had been a rear window that had been pushed out or broken and that had had its bars broken (T. 53).

William Michaels, the owner of the store then testified that he padlocked the store the previous night, that he had left $8 in silver in the cash register (T. 68-69) and that the next morning his store was in disarray (T. 70). On cross-examination, he testified that Williams said to him at the police station that he "didn't know it was a Brother's store." (T. 79)

William Johnston, the Holmes guard, testified that when he entered the store he found Williams lying behind a counter looking up at him (T. 111).

Patrolman Kevin Donoghue, Addison's partner, also testified that he found Williams in the store (T. 162).

The Court helped Williams with various motions and evidentiary objections (T. 111, 129, 162, 173).

Williams used the services of Mr. Stim at various times throughout the trial (T. 175, 176, 178, 180). After stating that he was not familiar with a motion to dismiss the indictment (T. 174), Williams then consulted with Mr. Stim (T. 175, 176) and then proceeded to make that motion (T. 176-79) citing three cases, apparently received from Mr. Stim (T. 178).

Williams acknowledged that he had consulted with Mr. Stim before the case started (T. 183) and stated that Mr. Stim would submit his requests for jury charge (T. 188).

Mr. Stim prepared a subpoena duces tecum for petitioner (T. 190), and at the end of trial, reserved all motions with respect to the verdict until the day of sentencing (T. 295).

Williams was convicted of burglary in the third degree and acquitted of petit larceny. The people had dropped the charge of possession of burglar's tools.

The Sentencing Hearing

Mr. Stim made presentence motions for Williams on April 27, 1972. Williams acknowledged at the Sentencing hearing that Mr. Stim was his attorney (Sentencing Minutes, 2) and Mr. Stim represented Williams throughout the Sentencing Hearing (Sentencing Minutes, passim).

After reviewing Williams' probation report and discovering that had had eighteen prior conflicts with the law within the last ten years and had served many prison sentences (Sentencing Minutes 16-21), the Court sentenced petitioner to a minimum term of two years four months and a maximum of seven years.

The Petition for a Writ of Habeas Corpus

Provided with his chance to explain his alleged conflict with Mr. Stim, Williams made no attempt to explain that conflict in his pro se petition or his pro se "Memorandum in Rebuttal".

After counsel was appointed below, the petition filed alleged that Williams refused to accept Mr. Stim's advice to accept a plea and that Stim then ceased an active role in defending Williams.

In the Memorandum of Law submitted for Williams by counsel to the District Court, Counsel stated: "It is clear

from the facts set forth in the petition that the petitioner and his appointed counsel were at loggerheads from the moment that petitioner refused to accept a plea that would imprison him for three years." (Memorandum of Law in Support of Petitioner's Application for a writ of habeas corpus, p. 9).

Thus, Williams was dissatisfied with Mr. Stim because, confronted with his client's having been caught in a clothing store, Mr. Stim recommended that Williams plead guilty.

The Opinion of the District Court

The District Court (Tenney, J.) held that Williams' constitutional right to counsel had been "knowingly and validly waived by him at trial when he elected to defend himself rather than to be represented by his appointed counsel." (Decision, p. 3). The Court assumed the veracity of all of Williams' allegations except where the record allowed it to determine the facts. Thus the Court assumed that Williams claim would be strongest if he could establish that he made his first complaint where a delaying motive could not be attributed to him, that he presented his reasons at the time and later to the presiding judge and that no judge inquired into the justification of his dissatisfaction (Decision, p. 8)*

* The Appellee does not concede the truth of these statements.

The Court found that the transcript demonstrated that Stim ably represented Williams at the Huntley hearing notwithstanding Williams' allegation that Stim had lost interest in his case several months earlier when he refused to plead guilty (Decision, p. 4). The Court considered the instances that Stim aided Williams at the trial and at the sentencing hearing, indicated above, pp. 7-8.

Although recognizing that the trial court should inquire into a defendant's alleged conflict with appointed counsel, the court realized that the defendant must show good cause and bona fides before being permitted to change counsel at the eve of or during trial. The trial judge must consider the request in conjunction with the trial delay that would follow.

Relying on United States v. Morrissey, 461 F. 2d 666 (2d Cir., 1972), the Court denied the application for a writ. In Morrissey, the defendant requested a change in counsel four months before the trial started on the ground that he and his counsel could not understand each other and that counsel could not or would not represent him effectively. Although this Court in Morrissey indicated that a trial judge should inquire into a defendant's dissatisfaction with counsel, the trial judge's error becomes insubstantial where the defendant's allegations are incorrect or cured by subsequent actions of

defendant's counsel or the trial judge.

The District Court found Williams in the same situation as Morrissey, since the record indicates that the reasons for Williams' dissatisfaction with counsel were insubstantial and that no irreconcilable conflict existed between them (Decision, p. 10). The Court found that the record demonstrated that Stim performed quite adequately when given an opportunity, that Williams did make use of Stim at various times, that there was no apparent conflict at the Huntley hearing even though Williams alleged that there was, and that Williams was aware of the advantages of being represented by counsel since he had an extensive criminal record and clearly expressed his understanding of the disadvantages of proceeding pro se.

With respect to Williams' claim that the trial judge was biased against him, not presented on this appeal, the Court found that "an inference of fair-mindedness rather than bias is justified by the record, since it is obvious that the judge not only exhibited a willingness to explain the complexities of legal procedure to petitioner, but also aided him by questioning witnesses and making motions on his behalf." (Decision, p. 14).

The Court thus denied the petition for a writ of habeas corpus.

ARGUMENT

THE DISTRICT COURT PROPERLY DENIED AN EVIDENTIARY HEARING. IN ANY EVENT, THE RECORD DEMONSTRATES THAT APPELLANT WAIVED HIS RIGHT TO BE REPRESENTED BY COUNSEL.

A.

An evidentiary hearing is not required on an application for a writ of habeas corpus where the petitioner would not be entitled to relief even if his versions of the facts were true. Procunier v. Atchley, 400 U.S. 446, 451-52 (1971). Townsend v. Sain, 372 U.S. 295, 312 (1963).

A hearing is not required where a petition for habeas corpus is, on its face, defective as a matter of law or where the District Court has before it the state record which provides all necessary information. United States ex rel. McGrath v. LaVallee, 319 F. 2d 308 (2d Cir., 1963); United States ex rel. Mitchell v. Follette, 358 F. 2d 922 (2d Cir., 1966).

The District Court thus properly found the petition without legal merit assuming that the facts existed that would put Williams in the strongest position possible.

Although Williams alleged irreconcilable conflict with appointed counsel and asserts that he should be given an opportunity to explore that conflict before a court, the conflict that he does assert, given an opportunity to delineate and express it fully in his petition to the Court below and in his brief to this Court, is legally without merit and not supported by the record. Williams alleges in his brief to this Court that he did not trust his lawyer and that his attorney did not assist him in the preparation of his defense because he refused to accept a guilty plea. In the petition below that was prepared by counsel, Williams alleged that he refused to accept Mr. Stim's advice to accept a plea and that Mr. Stim then ceased an active role in his defense.

Not only are such allegations insufficient as a matter of law but when considered in light of the record they are groundless. Not only was the advice to accept a plea reasonable considering Williams was found in the store by two security guards, but at all times when given the opportunity, Mr. Stim ably represented Williams. Moreover, Williams' allegation that he rather than Mr. Stim was the impetus behind the Huntley hearing is of no significance since there was really nothing of any significance to contest at the Huntley hearing and no statement of Williams was necessary or employed to prove his guilt.

It has been long settled that a defendant's displeasure with his attorney because the attorney advised him to plead guilty is not a sound reason for dissatisfaction and does not support a claim of lack of effective counsel. United States ex rel. Maniscalco v. LaVallee, 417 F. 2d 1056 (2d Cir., 1969) cert. den. 397 U.S. 1047 (1870); United States v. Guterman, 147 F. 2d 540 (2d Cir., 1945).

Maniscalco, like Williams, was refused a change of counsel, but unlike Williams, stood mute while his attorney did nothing. Nonetheless, the Court refused to find that he had been denied the effective assistance of counsel.

The quality of legal representation cannot be abstractly measured without reference to the merits of the defendant's case. United States ex rel. Testamark v. Vincent, 496 F. 2d 641 (2d Cir., 1974). When Williams' allegation of ineffective representation of counsel is considered in the light of the strength of the criminal charges against him, the fact that Mr. Stim was the second attorney assigned and the lack of any compelling necessity for a Huntley hearing, his claim is not supported by the record. The Court below thus properly relied on that record to deny the petition without an evidentiary hearing.

B.

An independent investigation demonstrates that Williams waived his right to be represented by counsel. In deciding whether there has been an effective waiver of the right to counsel, the Court will consider the facts and circumstances of the particular case including the background, experience and conduct of the accused. United States v. Calabro, 467 F. 2d 973 (2d Cir. 1972), cert. den. 410 U.S. 926 (1973).* In United States v. Morrissey, supra, the defendant claimed that he had been denied the effective assistance of counsel because the trial judge "failed to investigate [his] dissatisfactions with assigned counsel and subsequently ordered appellant to accept assigned counsel or to proceed pro se." As occurred here, counsel acquiesced in the demands of his client and even asked to be relieved as counsel. The defendant chose to proceed pro se with assigned counsel acting in an advisory capacity; the trial judge helped the defendant, as did the trial judge here, by questioning some witnesses and making motions on behalf of the defendant. Even though the Court of Appeals found that the

* Petitioner had had 18 conflicts with the law before the one in issue here and had served many prison sentences (Sentencing Minutes, 16-20). He was thus well versed in the criminal process.

defendant's reasons for his dissatisfaction with counsel were serious enough to warrant a searching inquiry by the trial judge, a depth of dissatisfaction not conceded by the appellee here, the Court held that the record indicated that the defendant's reasons for wanting a change of counsel were insubstantial and that therefore the trial court's requiring the defendant to proceed pro se or continue with his assigned counsel was proper. Just as in Morrissey where the Court found that there was no irreconcilable conflict between the defendant and his assigned counsel because they conferred during the motion proceedings and trial, the Court should find that here there was no justifiable reason to allow the petitioner a third attorney.

Where the accused has refused to choose between appearing pro se and accepting assigned counsel, the courts have found a waiver of the right to counsel. United States ex rel. Testamark v. Vincent, supra (Defendant asked for different counsel six and one-half months before trial and later at the opening of the trial). Accord, United States ex rel. Torry v. Rockefeller, 361 F. Supp. 422 (W.D.N.Y. 1973); See Hodge v. United States, 414 F. 2d 1040 (9th Cir. 1969) (Appellant's failure to use advisory counsel present at sentencing "with full knowledge of his right to do so, amounted to waiver", at 1044). Williams' refusal to utilize his assigned counsel, except on those occassions when he desired to do so, constitutes a waiver of the right to counsel on his part.

The accused must accept counsel assigned to him unless he shows good cause why he should be allowed different counsel. United States v. Calabro, supra; Davis v. Stevens, 326 F. Supp. 1182 (S.D.N.Y. 1971) and cases cited therein; United States ex rel. Torry v. Rockefeller, supra. In Calabro, the Court stated that to substitute counsel at trial, the accused must show cause for doing so, that is, he must show a conflict of interest, a complete breakdown in communications between him and his lawyer or an irreconcilable conflict. The trial court is obligated to inquire into substantial complaints but not where the accused's bona fides are suspected. The accused must be able to present justifiable dissatisfaction with his counsel. Disagreement over trial tactics is insufficient. The record here is totally barren of any justifiable conflict of interest or any complete breakdown in communications between Williams and Mr. Stim. In fact, Williams did communicate with assigned counsel at various points throughout the trial. As in Calabro, only the trial judge can be aware of nuances that the record cannot convey with respect to the request for assignment of another attorney. An unexplained dissatisfaction with counsel at the last minute yields no grounds for a claim of a constitutional deprivation of the right to counsel. United States ex rel. Baskerville v. Deegan, 428 F. 2d 714 (2d Cir. 1970), cert. den. 400 U.S. 928 (1970). The trial court is not required to grant a continuance so that the defendant may get a new attorney where the present attorney is adequate. United

States v. Abbamonte, 348 F. 2d 700 (2d Cir. 1965), cert. den. 382 U.S. 982 (1966). There is no doubt that the assigned counsel here was adequate and that the trial court was aware of his competence.*

Furthermore, an accused has no absolute right to change counsel once the proceedings have begun or on the eve of trial. United States v. Calabro, supra; United States ex rel. Robinson v. Fay, 348 F. 2d 705 (2d Cir. 1965), cert. den. 382 U.S. 997; United States ex rel. Torry v. Rockefeller, supra. Here, the district attorney was prepared to go to trial immediately after the Huntley Hearing, and therefore any assignment of new counsel would have required a further delay in the beginning of the trial.

The cases where the courts have reiterated that a request for a new attorney cannot be used to delay the proceedings are legion. See, e.g. United States v. Rosenthal, 479 F. 2d 837 (2d Cir. 1972); United States v. Calabro, surpa;

* The trial judge stated in open court that he had long experience with Mr. Stim and that he knew he was competent. (T. 3)

United States v. Morrissey, supra; United States ex rel. Davis v. McMann, 386 F. 2d 611 (2d Cir. 1967), cert. den. 390 U.S. 958 (1968); United States v. Llanes, 374 F. 2d 712 (2d Cir. 1967), cert. den. 388 U.S. 917 (1967); United States v. Mitchell, 354 F. 2d 767 (2d Cir. 1966); United States v. Plattner, 330 F. 2d 271 (2d Cir. 1964). The trial court must balance the right to a change of counsel with sound judicial administration. United States ex rel. Jackson v. Follette, 425 F. 2d 257 (2d Cir. 1970). Williams was working with his second attorney, and he had worked with this attorney without complaint from November 17, 1971, when he was assigned, until the beginning of February, 1972, if not later, the time which had been set for the beginning of the trial. The only conclusion is that Williams wanted to delay the commencement of the trial.

Of course, the trial court must explain to the defendant that he has a choice between appearing pro se or with counsel; that a lawyer will be assigned; that the defendant has a reasonable time to make the decision; and that its advisable to have an attorney. United States v. Plattner, supra; See also United States ex rel. Maldonado v. Denno, 348 F. 2d 12 (2d Cir. 1965), cert. den. 384 U.S. 1007 and United States ex rel. Higgins v. Fay, 364 F. 2d 219 (2d Cir. 1966). It is clear here that Williams knew that he had a choice and that it was advisable to appear with an attorney. Even where the trial court

has not gone into every detail of the colloquy required by Plattner, the Courts have held that there was no error where the circumstances show the defendant aware of his right to counsel and the advantages of counsel. United States v. Rosenthal, supra; United States v. Duty, 447 F. 2d 449 (2d Cir. 1971).

In United States v. Young, 482 F. 2d 993 (5th Cir. 1973), the Court stated that the defendant may demand a different appointed attorney only for good cause and that the appointment of new counsel is within the discretion of the trial court. In Young, the record as a whole demonstrated that there was no breakdown of communication between the defendant and his attorney. On the eve of trial, the Court must be sure that the defendant is not attempting to delay the proceedings. See also United States ex rel. Davis v. McMann, supra.

In United States v. Spencer, 439 F. 2d 1047 (2d Cir. 1971), the petitioner claimed that the court should not have relieved him of his counsel as he had requested. The petitioner understood he could proceed pro se or with his assigned counsel and knew the advantages of having counsel. The Court of Appeals suggested that as an alternative to requiring the defendant to proceed entirely pro se his assigned attorney should be made available as a resource. This is the procedure that was followed here.

In Brown v. Craven, 424 F. 2d 1166 (9th Cir. 1970), the dispute between the defendant and his appointed attorney arose almost immediately after the assignment, and there was a long period between the defendant's expression of discontent and the start of the trial. Here, the claimed expression of discontent occurred after the trial date had been set. In United States v. Mitchell, supra, the Court acknowledged that it was a difficult selective service case with First Amendment overtones, unlike the case at bar, so that the defendant should have been granted a continuance to retain new counsel. In United States v. Harrison, 451 F. 2d 1012 (2d Cir. 1971) the defendant had no counsel at all and although he was an attorney, made no attempt to defend himself. His situation was considerably different from Williams who desired that counsel be appointed for a third time.

Here, Williams had been granted one change of counsel; his claim of conflict with his attorney is obviated by his use of the attorney when it pleased him to do so; the appointment of new counsel would have required even further delay in the start of his trial; he clearly knew the disadvantages of proceeding pro se; and the admitted basis for his dissatisfaction was his refusal to accept a guilty plea arranged for him. Clearly, petitioner waived his right to counsel when he refused to make

any explicit decision between appearing pro se or with assigned counsel, but conducted his own trial with occasional advice from his assigned attorney.

CONCLUSION

FOR THE ABOVE REASONS, THE DECISION OF THE DISTRICT COURT SHOULD BE AFFIRMED IN ALL RESPECTS

Dated: New York, New York
April 7, 1975

Respectfully submitted,

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STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

BARBARA D'ANDREA , being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for respondent-appellee herein. On the 7th day of April , 1975 , she served the annexed upon the following named person :

JAMES F. GILL, ESQ.
230 Park Avenue
NEw York, New York 10017

Attorney in the within entitled proceeding by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by him for that purpose.

Barbara D'Andrea

Sworn to before me this
7th day of April , 1975

David P. Buck

Assistant Attorney General
of the State of New York

Dept